



## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91421; File No. SR-NASDAQ-2021-012]

### **Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Waive the Entry Fee and the All-Inclusive Annual Listing Fee for Any Company Not Listed on a National Securities Exchange That Is Listing upon Closing of Its Acquisition of a Special Purpose Acquisition Company Listed on Nasdaq**

March 26, 2021

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on March 16, 2021, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to waive the Entry Fee and the All-Inclusive Annual Listing Fee for any company not listed on a national securities exchange that is listing upon closing of its acquisition of a special purpose acquisition company listed on Nasdaq.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

The text of the proposed rule change is available on the Exchange's Website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq proposes to amend Listing Rules 5910 and 5920 to waive the Entry Fees and Listing Rule IM-5900-4 to waive the All-Inclusive Annual Listing Fee for any company not listed on a national securities exchange that is listing upon closing of its acquisition of a special purpose acquisition company ("Acquisition Company") listed on Nasdaq.

When an Acquisition Company consummates its business combination, it is typically the legal acquirer in the transaction and, provided it meets the continued listing standards applied in connection with a business combination by a listed Acquisition Company, it can remain listed on the Exchange.<sup>3</sup> Following the business combination, the

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<sup>3</sup> Among the continued listing requirements applicable to an Acquisition Company under IM-5101-2 is the requirement that the combined company must meet all initial listing requirements following a business combination.

company is not required to pay any additional listing fees for any shares issued in connection with its business combination, so there are no listing fees payable in connection with a business combination between a Nasdaq-listed Acquisition Company and a company which is not listed on a national securities exchange where the Nasdaq-listed Acquisition Company is the acquirer in the transaction. Similarly, Nasdaq does not have any provision for charging prorated annual fees with respect to shares of currently listed companies issued during the course of a calendar year (such shares are reflected in the full year annual fee bill for the next subsequent calendar year). As such, there are no fees imposed upon the consummation of a business combination by a Nasdaq-listed Acquisition Company in which it is the surviving legal entity. By contrast, if a company that is not listed on Nasdaq or another national securities exchange merges with a Nasdaq-listed Acquisition Company and the non-listed company is the acquirer in the transaction, the non-listed company is treated as a new listing and must pay the Entry Fees and the prorated All-Inclusive Annual Listing Fee, subject to certain credits.<sup>4</sup>

Nasdaq does not believe that this disparate treatment of two substantially identical transactions is appropriate. The decision whether to structure a business combination with the Acquisition Company as the legal acquirer rather than the other party does not result in the listing of a substantively different entity. Accordingly, the Exchange believes there is no basis for charging fees purely on the basis of the structure of the business combination chosen by the parties. To address the existing disparity in fees Nasdaq proposes to modify the Rule 5900 Series to provide a waiver to the entry and annual fees

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<sup>4</sup> Listing Rule IM-5900-1(b) provides for certain credits that benefit a non-Nasdaq company that lists in connection with its acquisition of a Nasdaq listed company.

otherwise owed by any company not listed on a national securities exchange that is listing upon closing of its acquisition of an Acquisition Company listed on Nasdaq.

Specifically, Listing Rule IM-5900-4 currently includes a waiver of the prorated All-Inclusive Annual Listing Fee for any issuer that is not listed on a national securities exchange immediately prior to its initial listing on Nasdaq but is listing its Primary Equity Securities upon closing of its acquisition of a company listed on another national securities exchange pursuant to special rules for acquisition companies whose business plan is to complete one or more acquisitions. Nasdaq proposes to extend this waiver so that it will apply in cases where a company that is not itself listed on a national securities exchange immediately prior to its initial listing on the Exchange is listing upon the closing of its acquisition of an Acquisition Company which had a class of equity securities listed on Nasdaq prior to the closing of such acquisition.

Listing Rule IM-5900-1(b) provides for certain credits that benefit a non-Nasdaq company that lists in connection with its acquisition of a Nasdaq listed company.<sup>5</sup> Nasdaq proposes to clarify that a company that received a waiver of the All-Inclusive Annual Listing Fee for the remainder of the calendar year in which the listing occurs, as described above, is not eligible for any credits under Listing Rule IM-5900-1(b).

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<sup>5</sup> Listing Rule IM-5900-1(b) provides that companies will receive a credit or waiver when a non-Nasdaq company completes a merger with a Nasdaq company and the non-Nasdaq company is the surviving entity and lists on Nasdaq. If the Nasdaq company previously paid its All-inclusive Annual Listing Fee, the surviving non-Nasdaq entity will, upon listing on Nasdaq, receive a credit for the All-Inclusive Annual Listing Fee previously paid by the Nasdaq company, prorated for the months remaining in the year after the merger. If the Nasdaq company has not paid its All-inclusive Annual Listing Fee for the year, the Nasdaq company will receive a waiver of the All-Inclusive Annual Listing Fee applicable to the months remaining in the year after the merger and must pay the remaining balance of its All-Inclusive Annual Listing Fee, representing the fee for the period it was listed.

Similarly, Listing Rules 5910(a)(7)(iii) (for companies listing on the Nasdaq Global and Global Select Markets) and 5920(a)(8)(iii) (for companies listing on the Nasdaq Capital Market) provide that the Entry Fees shall not be applicable with respect to any securities that are listed on another national securities exchange but not listed on Nasdaq, if the issuer of such securities is acquired by an unlisted company and, in connection with the acquisition, the unlisted company lists exclusively on the Nasdaq. The Exchange also proposes to extend this waiver so that it will apply in cases where a company that is not itself listed on a national securities exchange immediately prior to its initial listing on the Exchange is listing upon closing of its acquisition of an Acquisition Company which had a class of equity securities listed on Nasdaq prior to the closing of such acquisition. To that end, Nasdaq proposes to adopt Listing Rules 5910(a)(7)(v) (for companies listing on the Nasdaq Global and Global Select Markets) and 5920(a)(8)(v) (for companies listing on the Nasdaq Capital Market) to provide that the Entry Fees shall not be applicable with respect to any securities that are listed on Nasdaq by a previously unlisted company in connection with its acquisition of a company listed under IM-5101-2 (an acquisition company whose business plan is to complete one or more acquisitions).

The Exchange does not expect there to be a significant number of listings in which this proposed fee waiver will be applicable. Consequently, the proposed rule change would not affect the Exchange's commitment of resources to its regulatory oversight of the listing process or its regulatory programs.

Finally, Nasdaq proposes to update the title of Listing Rule IM-5900-4 to clarify its applicability, as modified by this proposed amendment and to identify the paragraphs

of this rule with letters to improve its readability. Nasdaq also proposes to update Listing Rules 5910 and 5920 to make conforming and formatting changes.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>6</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>7</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As a preliminary matter, Nasdaq competes for listings with other national securities exchanges and companies can easily choose to list on, or transfer to, those alternative venues. As a result, the fees Nasdaq can charge listed companies are constrained by the fees charged by its competitors and Nasdaq cannot charge prices in a manner that would be unreasonable, inequitable, or unfairly discriminatory.

The Exchange believes that the proposed fee waivers are equitable as they are being implemented to avoid an anomalous fee outcome arising from the manner in which an Acquisition Company business combination has been structured.

The Exchange believes that the proposal is not unfairly discriminatory, because the proposed waivers are intended to eliminate a current distinction within the rules and avoid the impact on a small group of issuers of an anomalous fee outcome arising from the manner in which an Acquisition Company business combination has been structured. Nasdaq does not have any provision for charging the Entry Fees or the prorated All-

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<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 15 U.S.C. 78f(b)(4) and (5).

Inclusive Annual Listing Fee with respect to shares of currently listed companies issued during the course of a calendar year (such shares are reflected in the full year annual fee bill for the next subsequent calendar year). As such, there are no fees billed in connection with the issuance of additional shares upon consummation of a business combination by a Nasdaq-listed Acquisition Company in which it is the surviving legal entity. By contrast, if a company that is not listed on Nasdaq or another national securities exchange merges with a Nasdaq-listed Acquisition Company and the non-listed company is the acquirer in the transaction, the non-listed company is treated as a new listing and must pay the Entry Fees and the prorated All-Inclusive Annual Listing Fee in relation to all shares issued and outstanding at the time of initial listing, subject to certain credits.<sup>8</sup>

An Acquisition Company is a shell company with no business operations. Consequently, the parties to a business combination between an Acquisition Company and an operating company have significant flexibility in how they choose to structure the business combination, including in determining which entity will be the legal acquirer. Accordingly, the Exchange is proposing to amend its fee structure to reflect the incidental nature of the resulting Acquisition Company business combination and to avoid treating companies undergoing similar business combinations disparately.

By contrast to an Acquisition Company business combination, there are typically more significant limitations on the ability of the parties to a merger between two operating companies to make decisions about which entity will be the acquirer, including, for example, the desire to maintain the acquirer's SEC registration and concerns about

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<sup>8</sup> Listing Rule IM-5900-1(b) provides for certain credits that benefit a non-Nasdaq company that lists in connection with its acquisition of a Nasdaq listed company.

how to present the combined entity to the market. As such, it is much more likely that the listing fee implications of how the transaction is structured would be a major consideration for the parties to an Acquisition Company business combination than would be the case in a merger between two operating companies. As the implications of the proposed fee waivers for decisions relating to the transaction structures utilized by unlisted companies listing in connection with the acquisition of an Acquisition Company are typically greater than for other companies listing in conjunction with merger transactions, the proposed waivers are not unfairly discriminatory.

Nasdaq believes that the proposed rule change to clarify that a company that received a waiver of the All-Inclusive Annual Listing Fee for the remainder of the calendar year in which the listing occurs, as described above, is not eligible for any credits under Listing Rule IM-5900-1(b) does not change the substance of Listing Rule IM-5900-1(b) and protects investors and the public interest by clarifying the applicability of the rule and making it easier to understand.

Finally, Nasdaq believes that the proposed rule change to identify paragraphs with letters and to update the title of Listing Rule IM-5900-4, to describe the applicability of this rule to waiver of certain annual fees “in Conjunction with a Non-Exchange Listed Issuer Business Combination with an Acquisition Company,” does not change the substance of this rule and protects investors and the public interest by clarifying the applicability of the rule and making it easier to understand. Similarly, Nasdaq believes that conforming and formatting changes to Listing Rules 5910 and 5920 do not change the substance of these rules and protect investors and the public interest by making them easier to understand.



For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The proposed waiver will be available to all similarly situated issuers on the same basis. The Exchange does not believe that the proposed waivers will have any meaningful effect on the competition among issuers listed on the Exchange.

The Exchange operates in a highly competitive market in which issuers can readily choose to list new securities on other exchanges and transfer listings to other exchanges if they deem fee levels at those other venues to be more favorable. Because competitors are free to modify their own fees in response, and because issuers may change their listing venue, the Exchange does not believe its proposed fee change can impose any burden on intermarket competition. Nasdaq notes that the NYSE is its primary competitor for listing companies and that the NYSE has already adopted a waiver of its comparable listing fees in the scenarios similar to those covered in this proposal.<sup>9</sup>

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

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<sup>9</sup> See Securities Exchange Act Release No. 89773 (September 4, 2020), 85 FR 55902 (September 10, 2020) (SR-NYSE-2020-40).

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>10</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2021-012 on the subject line.

#### Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

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<sup>10</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

All submissions should refer to File Number SR-NASDAQ-2021-012. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2021-012 and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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<sup>11</sup> 17 CFR 200.30-3(a)(12).